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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTIN, INC.,

Petitioner,

vs.

BLC INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED FOR REVIEW

(1) Did petitioner's advertisement of its Wisconsin hotel, restaurant and bar business over one Minnesota radio station constitute "the kind of continuous and systematic general business contacts" which could subject the petitioner to the general jurisdiction of the Minnesota courts under the Due Process Clause of the United States Constitution?

(2) If not, does this action for contribution for damages resulting from an automobile accident "arise out of" or "relate to" petitioner's advertisement of its Wisconsin hotel, restaurant and bar business over a Minnesota radio station so as to subject the petitioner to the specific jurisdiction of the Minnesota courts under the Due Process Clause?

PARTIES

There were only two parties to the proceedings in the Minnesota Supreme Court and Minnesota Court of Appeals. They are the petitioner, Westin, Inc., and the respondent, BLC Insurance Company.

Westin, Inc. does not have a parent company, subsidiary or affiliate company.

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WESTIN, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Westin, Inc. respectfully petitions for a writ of certiorari to review the final decree of the Supreme Court of Minnesota entered in this case on April 15, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals of Minnesota is reported at 359 N.W.2d 752 (Minn. Ct. App. 1985). The order of the Supreme Court of Minnesota denying the petition of Westin, Inc. for further review was issued without opinion and is unreported.

The Order of the Minnesota Supreme Court is reprinted at Appendix A. The Opinion and Decision of the Minnesota Court of Appeals is reprinted at Appendix B. The Order and Memorandum of the Hennepin County District Court is reprinted at Appendix C.

JURISDICTION

The final decree of the Supreme Court of Minnesota denying the petition of Westin, Inc. for review of the decision of the Minnesota Court of Appeals in this case was issued and entered on April 15, 1985. This Court has jurisdiction to review the final decree of the Minnesota Supreme Court by writ of certiorari pursuant to 28 U.S.C. § 1257(3). *See Calder v. Jones,* —— U.S. ——. 104 S. Ct. 1482, 1486 at n. 8 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Minnesota Statutes

Minn. Stat. § 543.19, subd. 1(c), 1(d) and subd. 3 (1982) provide in relevant part:

> 543.19. Personal jurisdiction over non-residents
>
> Subdivision 1. As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any for-

eign corporation or any non-resident individual, or his personal representative, in the same manner as if it were a domestic corporation or he were a resident of this state. This section applies if, in person or through an agent, the foreign corporation or non-resident individual:

. . .

(c) Commits any act in Minnesota causing injury or property damage, or

(d) Commits any act outside Minnesota causing injury or property damage in Minnesota, subject to the following exceptions when no jurisdiction shall be found:

(1) Minnesota has no substantial interest in providing a forum; or

(2) the burden placed on the defendant by being brought under the state's jurisdiction would violate fairness and substantial justice; or

(3) the cause of action lies in defamation or privacy.

. . .

Subd. 3. Only causes of action arising from acts enumerated in subdivision 1 may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

. . .

STATEMENT OF THE CASE

I.

PROCEDURAL STATUS AND METHOD OF RAISING AND DISPOSING OF CONSTITUTIONAL ISSUE IN STATE COURTS.

The petitioner Westin, Inc. (hereinafter "Westin") is a Wisconsin close corporation which operates a hotel, res-

taurant and bar business in Hudson, Wisconsin. The respondent BLC Insurance Company (hereinafter "BLC") is an Iowa business corporation which also does an insurance business in Minnesota. BLC commenced this action against Westin for contribution to insurance settlements which BLC made to persons injured in an automobile accident involving an automobile driven by one of BLC's insureds.

The action was brought by BLC in the Hennepin County District Court, Fourth Judicial District of the State of Minnesota. Westin answered BLC's complaint by alleging as an affirmative defense that the court was without personal jurisdiction over it. BLC conducted discovery in the form of interrogatories to Westin to ascertain the extent of Westin's contacts with the State of Minnesota. After answering BLC's interrogatories, Westin filed a motion to dismiss BLC's complaint on the ground that the courts of Minnesota did not have personal jurisdiction over Westin. BLC thereafter filed a motion to amend its complaint. Briefs and affidavits were submitted by both parties on their respective motions.

Westin made two principle arguments to the district court in its brief in support of its motion to dismiss: First, that Minnesota's long-arm statute, Minn. Stat. § 543.19, did not provide a statutory basis upon which the courts of Minnesota could exercise personal jurisdiction over Westin.[1] Second, that "Due Process Would Be Offended By The Assertion Of Personal Jurisdiction Over The Defendant, Westin, Inc., Because The Defendant Did Not Have

[1]At the trial court level, BLC maintained that the court had personal jurisdiction over Westin under Minn. Stat. § 543.19, subd. 1(c). The Minnesota Court of Appeals held that subd. 1(c) was not applicable but that Minn. Stat. § 543.19 subd. 1(d) applied to give the court jurisdiction. *BLC Ins. Co. v. Westin, Inc.*, 359 N.W.2d 752, 753-54 (Minn. Ct. App. 1985).

Sufficient Minimum Contacts With The State Of Minnesota To Justify Such An Assertion" (Heading of Westin's second principal argument, Westin's Main Br. p. 16) discussing a number of the cases of this court as authority.[2]

On March 21, 1984, the district court filed its Order and Memorandum in which the court treated Westin's motion to dismiss as a motion for summary judgment and ordered judgment to be entered in favor of Westin and against BLC. (App. C-1 and C-2) In its Memorandum, the district court held that "jurisdiction of the Minnesota courts over Defendant Westin, Inc. in this case violates due process". (App. C-8) Because the district court concluded that the amendments BLC sought to make to its complaint did not cure the constitutional deficiencies, the district court denied BLC's motion to amend its complaint. (App. C-1 and C-8)

BLC appealed the judgment of the district court to the Court of Appeals of Minnesota. Again on appeal Westin argued that "due process would be violated were Minnesota to assert *in personam* jurisdicion over defendant, a non-resident corporation". (Westin's Appeal Br. p. 3) The Court of Appeals filed its Opinion and Decision on January 8, 1985. The Court noted that Minnesota interprets its long-arm statute to extend personal jurisdiction in its courts to the limits of the Due Process Clause of the Fourteenth Amendment. *BLC Ins. Co. v. Westin, Inc.*, 359 N.W.2d 752, 754 (Minn. Ct. App. 1985). After discussing cases of this court on the due process issue,[3] the court rendered the following Decision:

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[2]Westin cited *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Rush v. Savchuk*, 444 U.S. 320 (1980), *Hanson v. Denckla*, 357 U.S. 235 (1958), *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *Kulko v. California Superior Court*, 436 U.S. 84 (1978) (Westin's Main Br. pp. 16-23).

[3]*International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *Hanson v. Denckla*, 357 U.S. 235 (1958), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

> Westin, Inc. has the requisite minimum contacts with Minnesota to permit Minnesota to exercise personal jurisdiction over it. *BLC Ins. Co. v. Westin, Inc., supra,* 359 N.W.2d at 755-57.

The Court of Appeals reversed the judgment of the trial court. *BLC Ins. Co. v. Westin, Inc., supra,* 359 N.W.2d at 755-57.

Westin thereafter filed a timely petition for review of the decision of the Court of Appeals in the Supreme Court of Minnesota, framing the constitutional issue as follows:

> Has a nonresident defendant who has virtually no contact with Minnesota except that it advertises its out-of-state business over a Minnesota radio station for the purpose of causing Minnesotans to come to the defendant's state of residence to do business, thereby "invoked both the benefits and protections" of Minnesota law so as to be constitutionally subject to the jurisdiction of its courts, even in the absence of proof of any connection between the advertising and the plaintiff's cause of action? (Petition For Review, p. 1)[4]

On April 15, 1985, the Minnesota Supreme Court entered its Order denying the petition of Westin for review. (App. A-1)

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[4]Although the two questions presented for review in this Court were written as a single issue in the petition to review to the Minnesota Supreme Court, the substance of the issues raised is the same. The petitioner focused the Minnesota Supreme Court's attention on the consideration that there was no connection between Westin's advertising on Minnesota radio and the cause of action and that the advertising, therefore, could not form the basis for personal jurisdiction. The Minnesota rule of appellate procedure which requires the petitioner to set forth the issues, statement of criteria, statement of the case and argument in five pages or less does not lend itself well to an examination of the issue. *See* Minn. R. Civ. App. Proc. 117 subd. 3.

II.

FACTS

The factual background of this controversy is that on March 29, 1981, a car driven by BLC's insured, 18-year old Robert Messetler, collided with a car driven by Boyd LaCcsse near Stillwater, Minnesota. Stillwater is a Minnesota border city located on the St. Croix River which borders Minnesota and Wisconsin. Messetler was killed, and his two passengers and LaCosse were injured. BLC alleges in its complaint that prior to the accident, Messetler and his friends had gone to Westin's place of business in Hudson, Wisconsin. Westin operates a hotel, restaurant and bar business known as "Dibbo's" in Hudson, Wisconsin. Hudson is a Wisconsin border city also located on the St. Croix River. Hudson is located approximately 15 miles from the outskirts of St. Paul, Minnesota. St. Paul and Minneapolis, Minnesota, are part of a large metropolitan area referred to as the "Twin Cities."

Westin is a Wisconsin close corporation. It operates only one business, which is the hotel, restaurant and bar business in Hudson referred to above. Westin has never owned any property or operated any business or conducted any sales in Minnesota. It has never employed any employees, agents or representatives in Minnesota. None of its employees reside in Minnesota. Only 6.5% of Westin's total annual purchases of goods and services in 1981 were purchased in Minnesota. Less than one-third of that amount was spent on advertising. That advertising consisted of ten to fifteen 30-second commercials broadcast over one Twin Cities radio station, KQRS-FM, each week for a total of about five to seven minutes of radio advertising per week. In 1981, KQRS-FM's intended target audi-

ence was the 18-30 year old age group. KQRS-FM's broadcast area included not only the Twin Cities, but also a wide area in western Wisconsin. The major broadcast and print media in western Wisconsin come from the Twin Cities. Based upon surveys, KQRS-FM had a 15.7% share of the potential male audience between the ages of 18 and 34 within the reach of its signal between the hours of 6:00 A.M. and midnight.

BLC attempted to allege in an amended complaint that "on information and belief" its insured and his companions learned about "Dibbo's" as a result of Westin's advertising on KQRS-FM, but as a matter of fact, it was shown by affidavits submitted in the district court that BLC has no idea whether or not its insured or any of his companions ever listened to KQRS-FM or heard any of its advertising or whether or not the advertising had anything whatsoever to do with how BLC's insured learned about "Dibbo's."

At the time of the accident, Wisconsin law permitted the sale of alcoholic beverages to persons 18 years of age or older, whereas Minnesota law did not.[5] Also at the time of the accident, the Minnesota courts recognized a common law cause of action for contribution in favor of persons, or their subrogated insurance carriers, against liquor vendors for damages resulting from accidents such persons caused while intoxicated as a result of drinking alcoholic beverages they purchased from such vendors.[6] The Wisconsin courts did not recognize such a common law cause of action for contribution.[7]

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[5]*See* Wis. Stat. §§ 176.30 and 176.31 (1979-80) and Minn. Stat. § 340.73 (1982) cited in *West American Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676, 677 at n. 1 (Minn. 1983).

[6]*Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978).

[7]*Garcia v. Hargrove*, 46 Wis.2d 724, 176 N.W.2d 566 (1970) and *Olsen v. Copeland*, 90 Wis.2d 483, 280 N.W.2d 178 (1979).

ARGUMENT

This petition meets two of the criteria set forth in Sup. Ct. R. 17.1: First, the Minnesota Court of Appeals decided an important question of federal constitutional law inconsistent with the standards and reasoning of decisions of this court, and this case presents the Court with the opportunity to further develop the standards to be applied in "general" and "special" jurisdiction cases, a concept which was only recently recognized by this court and needs further development. *See* Sup. Ct. R. 17.1(c).

Second, the Minnesota Court of Appeals decided the constitutional questions at issue here in a way in conflict with decisions of other courts. *See* Sup. Ct. R. 17.1(b).

I.

THIS CASE PRESENTS THE COURT WITH THE IMPORANT OPPORTUNITY TO FURTHER EXPLAIN THE CRITERIA TO BE APPLIED BY STATE AND FEDERAL COURTS THROUGHOUT THE NATION IN DETERMINING WHETHER A COURT MAY EXERCISE "GENERAL" OR, MORE SIGNIFICANTLY, "SPECIAL" JURISDICTION OVER A NON-RESIDENT DEFENDANT UNDER THE DUE PROCESS CLAUSE.

A. The Very Important Distinction Between "General" And "Special" Jurisdiction Was Recognized By This Court For The First Time In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, — U.S. —, 104 S. Ct. 1868 (1984).

The theory of "general" and "special" jurisdiction was first formed nearly 20 years ago by Arthur T. von Mehren and Donald T. Trautman in their seminal treatise on jur-

isdiction entitled *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1136 (1966). That distinction was made for the first time by this Court last year in *Helicopteros Nacionales de Columbia v. Hall*, —— U.S. ——, 104 S. Ct. 1868 (1984) (hereinafter referred to as "*Helicol*"), which cited the von Mehren and Trautman treatise, —— U.S. at ——, 104 S. Ct. at 1872, ns. 8 and 9. The distinction between "general" and "special" personal jurisdiction is a very important development in the law of Due Process limitations on personal jurisdiction. The Court explained in *Helicol* that "general" jurisdiction may be based on continuous and systematic contacts which are unrelated to the controversy, whereas "special" jurisdiction may be exercised because the controversy arises out of or relates to the defendant's contacts with the forum, —— U.S. at ——, 104 S. Ct. at 1872. This case presents the Court with the opportunity to further explain these concepts in the context of whether or not a defendant, whose only contact[8] with a forum state is its advertising of its out-of-state hotel, restaurant and bar business in the forum state, is subject to the personal jurisdiction of the forum when the advertising is irrelevant to proving or to defending against any of the elements of the plaintiff's claim.

The Court has repeatedly ruled that a person has a Due Process interest in being free from being haled into court

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[8]Westin did purchase 6.5% of its total annual purchases of goods and services in Minnesota in 1981. Such purchases were not in and of themselves considered by the Minnesota Court of Appeals to be sufficient contacts with Minnesota to subject Westin to the jurisdiction of Minnesota's courts. *BLC Ins. Co. v. Westin, Inc.*, 359 N.W.2d 752, 754 (Minn. Ct. App. of 1984). That ruling is in accordance with the holding of this court in *Helicol*, — U.S. at —, 104 S. Ct. at 1874:

> [W]e hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.

in a jurisdiction with which he does not have at least "minimum contacts". *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *Hanson v. Denckla*, 357 U.S. 235 (1958), *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Rush v. Savchuk*, 444 U.S. 320 (1980), *Keeton v. Hustler Magazine, Inc.*, —— U.S. ——, 104 S. Ct. 1473 (1984), *Calder v. Jones*, —— U.S. ——, 104 S. Ct. 1482 (1984) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, —— U.S. ——, 104 S. Ct. 1868 (1984).

The Court has indicated that the solicitation of business through advertising reasonably calculated to reach the forum state is one of a number of "affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction". *World-Wide, supra*, 444 U.S. at 295 However, this court has never indicated that advertising an out-of-state business in a forum state is, by itself, sufficient contact to allow the forum to exercise jurisdiction over a non-resident defendant consistent with the Due Process Clause. *Growden v. Ed Bowlin and Associates, Inc.*, 733 F.2d 1149, 1151 (5th Cir. 1984). The answer to that question is of importance to the thousands of hotel, restaurant, tourist, resort, entertainment and amusement businesses of all sorts across this nation which advertise their businesses across state lines to attract out-of-state customers to their places of business. The answer is of particular importance to small locally-owned, locally-operated businesses, such as Westin's, who do not expect that advertising their businesses in media across state lines for the purpose of encouraging people to come to their local places of business in their own home states will subject them to suit in the states in which they advertise. The me-

thodology for answering the questions presented for review is of importance to lawyers and to the trial and appellate courts who must try to bring some form of established logic and policy considerations to bear in grapling with the difficult question of when the exercise of personal jurisdiction is constitutional under the Due Process Clause.

B. This Case Presents The Court With The Opportunity To Explain That Advertising In A State, By Itself, Is Not Sufficient Contact With A State To Form The Basis For The Exercise Of "General" Jurisdiction.

The traditional bases for the exercise of general jurisdiction were classified by von Mehren and Trautman as follows:

> American practice bases general jurisdiction to adjudicate on three types of relationship [sic] between the defendant and the forum: his domicile or habitual residence; his presence; and his consent, at least when it is given after the controversy has arisen or after the action is brought. von Mehren and Trautman, *supra*, 79 Harv. L. Rev. at 1137 (footnotes omitted).

The justification for the exercise of general jurisdiction was succinctly explained by another of the scholars cited by this court in *Helicol*[9]:

> Systematic unrelated activity, such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an "insider" that he may safely be relegated to the State's politicai processes Brilmayer, *How Contacts Count: Due Process*

[9] ___ U.S. at ___, 104 S. Ct. at 1872, n.9.

Limitations on State Court Jurisdiction, 1980 S. Ct. Rev. 77, 87.

Helicol explained that a state court could exercise general personal jurisdiction over a foreign corporation if the defendant's contacts with the forum state constitute "continuous and systematic general business contacts" with the forum State. *Helicol,* —— U.S. at ——, 104 S Ct. at 1872-73, *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 438 (1952). Advertising, by itself, does not constitute the kind of "continuous and systematic general business contacts" which were found to exist in *Perkins* but not in *Helicol.*[10]

Since *International Shoe* was decided, the solicitation of business in a forum state by an out-of-state resident has played a part in deciding whether or not the forum may exercise jurisdiction over a nonresident. *World-Wide* referred to the solicitation of business through salespersons or through advertising as one of several "affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction." 444 U.S. at 295.

Prior to *International Shoe,* "it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the State and filled by shipment of good interstate, does not render the corporation seller amenable to suit within the state." *International Shoe.* 326 U.S. at 315. The solicitation in *International Shoe* consisted of face to face solicitations by 11 to 13

[10] *Cf. Keeton, supra,* in which the Court indicated that:

> [R]espondent's activities [of selling magazines] in the forum may not be so substantial as to support jurisdiction over *a cause of action unrelated to those activities.* But respondent is carrying on a "part of its general business" in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire. ___ U.S. at ___, 104 S.Ct. at 1481 (emphasis supplied, footnote omitted).

salesmen in the forum state, and the Court found those contacts sufficient for the exercise of personal jurisdiction. The Court explained:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue, 326 U.S. at 319.

Obviously, the type of solicitation the Court had in mind in *International Shoe* was the type that "may give rise to an obligation", such as the face to face solicitation involved in that case which could give rise to a contract obligation. The exercise of jurisdiction allowed in *International Shoe* turns out to have been what we now refer to as "special" jurisdiction. We know this from the very terms used by *International Shoe:* "so far as those obligations *arise out of or are connected with* the activities within the state," they may be sued upon there. 326 U.S. at 319 (emphasis supplied). *International Shoe* never intended that solicitation (and in particular media advertising) in and of itself would subject a nonresident defendant to the general jurisdiction of the forum.

Westin operates only one local hotel, restaurant and bar business which is located in Wisconsin. None of its business operations are conducted in Minnesota. No sales are made there. Virtually the only thing Westin did in Minnesota in 1981 was to advertise its Wisconsin business there for the purpose of causing both Minnesota and Wisconsin residents to come to its place of business in Wisconsin By

conducting advertising in Minnesota, Westin did not generally avail itself of both the benefits and protections of a panoply of Minnesota's laws as is the case with residents of Minnesota or persons who are incorporated or headquartered there or who extensively transact their business there. To hold that Westin's advertising in Minnesota subjected it to the general personal jurisdiction of Minnesota's courts would be to hold that advertising in a jurisdiction is tantamount to setting up a business there or operating one's business out of a headquarters there, such as was the case in *Perkins*. Certainly, *Helicol* does not contemplate such a result.

C. This Case Presents The Court With the Opportunity To Explain The Criteria To Be Used By The State And Federal Courts In Determining Whether Or Not A Claim "Arises Out Of" Or "Relates To" The Defendant's Activities Within The Forum State So As To Subject The Defendant To The "Specific" Jurisdiction Of A Court Under The Due Process Clause.

1. What the terms "arise out of" and "relate to" mean in the context of the constitutional limitations upon the assertion of personal jurisdiction under the Due Process Clause is a very important question which was left open by this Court in *Helicol* and should be answered.

In *Helicol*, the Court explained that:

> [W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exer-

cising "specific jurisdiction" over the defendant. —— U.S. at ——, 104 S. Ct. at 1872, n. 8.

As discussed above, *International Shoe* used much the same terminology, although it didn't label the concept "special jurisdiction," 326 U.S. at 319.

Because the respondent in *Helicol* conceded that her claims did not "arise out of" or "relate to" Helicol's activities in Texas, the Court did not explain what those terms mean in the context of Due Process limitations on the exercise of state court jurisdiction. The Court, however, indicated in a footnote that the terms themselves are not by any means self-explanatory. The Court declined to reach the question of "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that [an "arising out of" or "related to"] connection exists," *Helicol*, —— U.S. at ——, 104 S. Ct. at 1873, n. 10. That is precisely the question presented by this case, and this case is a good one in which to answer it and give guidance because the case requires a careful analysis as to why Westin's advertising cannot be said to "arise out of" or "relate to" BLC's claim.

2. The most thorough analyses of the question of what controversies "arise out of" or "relate to" a defendant's contacts with the forum state were made in the scholarly works cited by this court in *Helicol* on the topic of "special" jurisdiction.

a. The fairness criteria that in order for a contact to be sufficient to constitutionally bring a non-resident defendant within the personal jurisdiction of the forum, the contact must be relevant to one of the elements of the claim.

The Court in *Helicol* referred to Lea Brilmayer's treatise entitled *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 S. Ct. Rev. 77, *see* —— U.S. at ——, 104 S. Ct. at 1872, n. 9. In her treatise, Ms. Brilmayer found that "no one seems to have analyzed what it means to say that a contact with the forum is 'related to' the controversy or, as it is sometimes phrased that the cause of action 'arose out of' the defendant's activities in the forum," Brilmayer, 1980 S. Ct. Rev. at 82. She stated:

> Substantive relevance provides a natural test. A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits. *Id.*

Ms. Brilmayer made a most important point: *a fact which would be irrelevant to a lawsuit in which jurisdiction is not an issue "does not suddenly become related to the contro-*

versy simply because there are multistate elements." Brilmayer, 1980 S. Ct. Rev. at 83 (emphasis supplied).[11]

In this case, Westin's advertising in Minnesota has no relevance to the claim asserted by BLC. If Westin had not objected to the court's exercise of personal jurisdiction over it, no one would ever have considered that Westin's advertising was in any way relevant to this lawsuit. A contact which would be irrelevant to a case in which jurisdiction is not an issue, should not suddenly become "related to" the controversy because jurisdiction is an issue. Jurisdiction should be proper only if the contact has to do with a fact relevant to proving the plaintiff's case.[12]

Fairness requires that the jurisdictional contact must be relevant to proving the claim asserted in the absence of "continuous and systematic contacts" such as would subject the defendant to the general jurisdiction of the forum. Lea Brilmayer reasoned:

> The two bases of jurisdiction—unrelated and related contacts—therefore constitute alternative aspects of a State's sovereignty, namely, self-governance and territoriality. Systematic unrelated activity, such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an "insider" that he may safely be relegated to the State's political processes. Related contacts suggest a regulatory and territorial justification. The State is us-

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[11]For example, Ms. Brilmayer noted that:

> In *World-Wide Volkswagen*, the defendant's affiliation with other dealers doing business in Oklahoma was not a related contact since there was no reason to allege that fact other than to manufacture a jurisdictional connection. 1980 S. Ct. Rev. at 88.

[12]At least one federal circuit court of appeals applied this principle with respect to the effect of advertising on jurisdiction. In *Scheidt v. Young*, 389 F.2d 58, 60 (3rd Cir. 1968), the court recognized that defendant's advertising in a newspaper circulated in New Jersey was a "peripheral occurrence" which could not constitutionally subject the defendant to extraterritorial service of process. *See also Circus Circus Hotels, Inc. v. Superior Court*, 120 Cal. App.3d 546, 174 Cal. Rptr. 885 (1981) discussed below.

ing the same standard of conduct for defining what conduct is subject to regulation. Brilmayer, *supra*, 1980 S. Ct. Rev. at 87-88.

Advertising an out-of-state hotel, restaurant, tourist, entertainment, resort or amusement business in the media of a forum may give rise to certain peripheral benefits and protections of that state's law (such as protections against breaches of contract or tortious conduct on the part of the person hired to do the advertising) and certain obligations of state law (such as the obligation to pay the advertising bill and not to defame anyone or deceptively advertise or violate a copyright), but such advertising invokes no protections or benefits with respect to the business relationship that the one who advertises hopes the advertising will lead to. In order for a business relationship to ever arise, a critical event must take place: the consumer will have to make the decision and take the deliberate step of crossing state lines to come to the advertiser's place of business. That unilateral act on the part of the customer in coming to the advertiser's place of business does not also transport the substantive law of, and amenability of suit in, the consumer's state of residence into the advertiser's state of residence.[13] It is the *consumer* in that instance who is invoking the benefits and protections of the advertiser's state of residence by deliberately leaving his home state and going to another state to do business.

In this case, there is no evidence at all that BLC's insured or his companions ever heard Westin's advertising

[13] *Cf. World-Wide, supra,* 444 U.S. at 298:

> [T]he mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." [citing *Hanson v. Denkla, supra,* 357 U.S. at 253].

on KQRS-FM or that it was in any way a motivating factor in their decision to come to "Dibbo's" in Wisconsin. But even if BLC's insured *had* come to Wisconsin to do business with Westin because he heard the ads, BLC has no complaint about the ads. The ads are not in any way relevant to the acts of negligence alleged by BLC or the injury allegedly sustained by BLC.

b. The fairness criteria that when an out-of-state buyer crosses state lines to come to a local seller and the only business transacted between them is in the seller's state of residence, the seller should not be required to come to the buyer's state of residence to answer a lawsuit concerning the transaction.

Special jurisdiction over a nonresident defendant is, at its root, simply an exception, for reasons of fairness, to the "traditional jurisdictional bias" in favor of requiring the plaintiff to come to the defendant's place of residence to sue him. von Mehren and Trautman, *supra,* 79 Harv. L. Rev. at 1167. von Mehren and Trautman believed that the jurisdictional bias in favor of the defendant's place of residence would be reversed "in any class of cases in which the controversy arises out of conduct that is essentially multistate on the part of the defendant, and essentially local on the part of the plaintiff", 79 Harv. L. R. at 1167-68. von Mehren and Trautman went on to observe that:

> Rather far-reaching bases for specific jurisdiction would then appear supportable with respect to certain classes of defendants, for example corporations whose economic activities and legal involvements were per-

> vasively multistate, while the situations in which specific jurisdiction could appropriately be exercised would be far fewer *when the defendant was a natural or legal person whose economic activities and legal involvements were essentially local.* . . . This analysis further suggests that specific jurisdiction is less supportable *when the plaintiff's involvements are also multistate.* von Mehren and Trautman, *supra,* 79 Harv. L. Rev. at 1168 (emphasis supplied).

This same concept was expressed by another respected scholar of personal jurisdiction, David P. Currie, in his frequently cited work Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. Ill. L.F. 533, 556:

> When the seller has remained at home, and the buyer has gone to his place of business to negotiate the sale or to accept delivery, the equities are again altered: It is difficult to suppress the feeling that the buyer can be fairly expected to return to the State where he did business if he wishes to bring suit.

These considerations were very important in *World-Wide.* It was the *plaintiff* who traveled to Oklahoma, not the defendant. Why, then, should he not be "fairly expected to return to the State where he did business if he wishes to bring suit"?

The traditional jurisdictional bias in favor of the defendant is supported by some very important fairness considerations. Some of these considerations were articulated in *World-Wide:*

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla,* 357 U.S., at 253, 78 S. Ct., at 1240, it has clear notice that it is subject to

> suit there, and *can act to alleviate the risk of burdensome litigation by procuring insurance,* passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. 444 U.S. at 297 (emphasis supplied).

The lack of foreseeability resulting in the lack of insurance is of primary concern in this case. It was not necessary to purchase liquor liability insurance to operate a bar in Wisconsin in 1981 because Wisconsin law did not allow a person who injured others while intoxicated (or his insurance carrier as is the case here) to sue the vendor who sold him the liquor. In 1984, the Wisconsin Supreme Court overruled prior cases that had precluded such an action from being brought. *Sorensen v. Jarvis,* 119 Wis.2d 627, 350 N.W.2d 108 (1984). However, the Court made its ruling prospective because of the reliance by vendors upon prior law, 119 Wis.2d at 647-48.

The Due Process Clause did not require Westin to foresee that it would be "haled into court"[14] in Minnesota to answer for its service of alcohol to a customer in Wisconsin simply because it advertised for the purpose of causing people to come to its place of business in Wisconsin. Westin isn't engaged in multistate business operations. It is a locally-owned and locally operated hotel, restaurant and bar business. Virtually the only multistate activity it did in 1981 was to advertise its business over one Twin Cities radio station. That station broadcasts not only in Minnesota but in a wide area of western Wisconsin as well. The advertising was not an unusual measure.

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[14]In *World-Wide* the court explained:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. 444 U.S. at 297.

The main media received in western Wisconsin comes from the Twin Cities. To the extent that Westin's advertising was directed to Minnesotans, its purpose was not to sell goods or services in Minnesota[15] but to encourage Minnesotans to come to Wisconsin.

Certainly, Westin's expectation would be that persons who made the trip to Wisconsin were purposefully availing themselves of the benefits and protections of *Wisconsin's* laws, not that their trip to Wisconsin would subject Westin to the jurisdiction of Minnesota. BLC's insured no doubt crossed state lines to come to Wisconsin to do business for the deliberate purpose of benefiting himself of *Wisconsin's* laws in transacting business with Westin. Messetler could legally drink alcoholic beverages in Wisconsin, where the legal drinking age was 18, whereas he could not legally drink alcoholic beverages in Minnesota, where the legal drinking age was 19. Westin could legally serve Messetler in Wisconsin, and did so with the expectation that because Messetler had come to Wisconsin to do business, they would be subject to the laws of Wisconsin.[16] Why should

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[15]Neither was the purpose of the advertising to injure anyone in Minnesota, and therefore the rule of *Calder, supra,* that "intentional conduct . . . calculated to cause injury to the respondent", ___ U.S. at ___, 104 S. Ct. at 1488, in his home state makes jurisdiction proper in respondent's home state is inapplicable. In the negligence or strict liability case of *World-Wide,* the Court emphasized that mere foreseeability of injury in the forum is not a sufficient benchmark for personal jurisdiction under the Due Process Clause, 444 U.S. at 295.

[16]The petitioner is aware that this court has said that choice of law concerns should not "complicate or distort the jurisdictional inquiry", *Keeton, supra.* — U.S. at —, 104 S. Ct. at 1480. Pttitioner believes, however, that the defendant's ability to foresee that the substantive laws of a jurisdiction will apply to him has been a major factor in analyzing jurisdiction since the Constitutional concept of minimum contacts was first formulated in *International Shoe* in which the Court reasoned:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it *enjoys the benefits and protection of the laws of that state.* The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the State, a procedure which requires

Westin's advertising in any way change the traditional jurisdictional bias that Westin be sued in its home state under its home state's laws?

The net result of the ruling of the Minnesota Supreme Court is that having found that the long-arm of its courts reaches into Wisconsin, it will be able to apply its law which it considers to be "better" than Wisconsin's.[17] If Minnesota has an interest in vindicating its laws, then Wisconsin certainly does too. The purpose of the Due Process Clause, however, is not to vindicate the interests of co-equal sovereigns in a federal system. Rather, it is to protect the liberty interest of the defendant in being governed by the sovereign he reasonably could foresee he would be governed by. Westin did nothing tortious in serving BLC's insured under Wisconsin's laws.[18]

Westin's advertising in Minnesota has nothing to do with this case. There is no evidence that BLC's insured heard about "Dibbo's" as a result of Westin's advertising. But even if he had, the purpose of the advertising was not to bring products or services *into* Minnesota, but to bring people to Westin's place of business in Wisconsin.

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the corporation to respond to *a suit brought to enforce them* can, in most instances, hardly be said to be undue, 326 U.S. at 319 (emphasis supplied).

The court in *World-Wide* had the application of substantive law squarely in mind when it said:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S. at 253, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

[17] *Blamey v. Brown*, 270 N.W.2d 884, 891 (1978).

[18] Alcohol can, indeed, be a "dangerous instrumentality" but that consideration has no bearing on the jurisdictional issue. In *World-Wide, supra*, the Court said:

> The "dangerous instrumentality" concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability. 444 S. Ct. at 567, n. 11.

The decision of BLC's insured to drive to Wisconsin to take advantage of its laws should not subject petitioner to the laws of the state from which BLC's insured came. The reasonable expectation of the parties was not that BLC's insured would take the jurisdiction of Minnesota with him, but that the conduct of the parties would be governed by Wisconsin.

II.

THE DECISION OF THE MINNESOTA COURT OF APPEALS IS INCONSISTENT WITH THE DECISIONS OF OTHER COURTS, SUCH AS THE CALIFORNIA COURT OF APPEAL AND THE CONFLICT SHOULD BE SETTLED BY THIS COURT.

As discussed above, ever since *International Shoe* was decided, the courts have known that solicitation of business in a forum state by a nonresident may play a part in the jurisdictional fairness issue. However, the decisions on the role of advertising are not consistent and no doubt this is because there is a disagreement as to *why* advertising should be considered to play a part in the due process issue.

The Minnesota Court of Appeals gave no explanation as to why advertising should play a constitutional role in this case, though obviously the court considered it to be a contact so significant that by itself, it tipped the constitutional scale in favor of jurisdiction. Why should this be so? As discussed above, it was BLC's insured who deliberately left Minnesota and came to Wisconsin to avail himself of legal rights and privileges available to him in Wisconsin but not in his home state. Based on the Court

of Appeals' reasoning and emphasis on the effect of advertising, every business which advertises through Twin Cities media broadcast or disseminated in Wisconsin should also be subject to suit in Wisconsin even though the advertising has nothing to do with the controversy. The effect of advertising on jurisdiction needs further careful analysis.

In contrast to the decision of the Minnesota Court of Appeals, the Court of Appeal of California ruled that advertising by a nonresident hotel corporation in California, which was not relevant to the controversy before the court, was not sufficient to subject the defendant to the personal jurisdiction of the California courts. *Circus Circus Hotels, Inc. v. Superior Court,* 120 Cal. App.3d 546, 174 Cal. Rptr. 885 (1981). The court found that there was no "substantial nexus" between the defendant's advertising and the plaintiffs' cause of action for loss resulting from the defendant's alleged negligence resulting in a burglary of plaintiffs' hotel room during a trip to Nevada, 174 Cal. Rptr. at 897. Other cases in confilct with Minnesota are *Scheidt v. Young,* 389 F.2d 58 (3rd Cir. 1968), *Braasch v. Vail Associates, Inc.,* 370 F. Supp. 809 (N.D. Ill. 1973) and *Orthmann v. Apple River Campground, Inc.,* Civ. No. 4-83-335, slip op. (U.S. Dist. Ct., Minn. October 12, 1983), aff'd on other grounds No. 83-2519, slip op. (8th Cir. June 17, 1985) which held that advertising is not a sufficient minimum contact for the constitutional exercise of personal jurisdiction where the advertising is irrelevant to the controversy. *Cf. Siskind v. Villa Foundation For Education, Inc.,* 642 S.W. 2d 434, 436-37 (Tex. 1982) holding that there must be a connection between the

nonresident defendant's contact with the forum and the plaintiff's cause of action and finding such a connection where the plaintiff alleged that the defendant's advertising constituted misrepresentation and a violation of the Texas Deceptive Trade Practices Act.[19]

This court should clarify the role that advertising plays in jurisdictional issues, specifically that advertising is no special category of contact but is subject to the same specific jurisdiction analysis that other contacts are subject to.

CONCLUSION

For the above reasons, the petitioner respectfully requests this court to grant this petition for a writ of certiorari.

Respectfully submitted,

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Attorneys for Petitioner,
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[19]*Cf. Delagi v. Volkswagenwerk AG of Wolfsburg*, 29 N.Y.2d 426, 328 N.Y.S.2d 653, 657 (1972) (advertising in New York media is not a sufficient contact with New York to exercise personal jurisdiction over a nonresident defendant under New York's long-arm statute) and *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067, 1068-69 (8th Cir. 1983) (plaintiff's cause of action did not arise out of the defendant's solicitation of business by distributing sales brochures in Arkansas so as to give Arkansas courts personal jurisdiction under Arkansas's long-arm statute).

APPENDIX A

OFFICE OF APPELLATE COURTS

Filed Apr. 15, 1985

Wayne Tschimperle, Clerk

STATE OF MINNESOTA
IN SUPREME COURT
C6-84-1422

BLC Insurance Company,

Appellant,

vs.

Westin, Inc ,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Westin, Inc. for further review be, and the same is, denied.

Dated: April 15, 1985.

BY THE COURT:

/s/ Douglas K. Amdahl
Chief Justice

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS
C6-84-1422

Hennepin County Nierengarten, Judge

BLC Insurance Company,

Appellant,

vs.

Westin, Inc.,

Respondent.

Dorsey & Whitney
By Michael A. Pysno
2200 First Bank Place East
Minneapolis, MN 55402

Doar, Drill & Skow, S.C.
Thomas D. Bell
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Endorsed
Filed January 8, 1985
Wayne Tschimperle, Clerk
Minnesota Court of Appeals

SYLLABUS

A Wisconsin border city vendor of intoxicating liquor advertising on a Twin City radio station has the requisite minimum contacts with Minnesota to permit Minnesota to exercise personal jurisdiction over it.

Reversed.

Considered and decided by Crippen, Presiding Judge, Huspeni, Judge, and Nierengarten, Judge, with oral argument waived.

OPINION

NIERENGARTEN, Judge

Appellant BLC Insurance Co. commenced this contribution action against Respondent Westin, Inc., a Wisconsin corporation which owns and operates Dibbo's Bar in Hudson, Wisconsin, following settlements it made in a fatal accident. Dibbo's motion for dismissal for lack of personal jurisdiction, treated as one for summary judgment, was granted. We reverse.

FACTS

In March 1981, Robert Messetler, age 18, was killed in a two-car accident near Stillwater, Minnesota. Messetler was returning to Minnesota after a night of drinking at Dibbo's Bar in Hudson, Wisconsin, located on the Minnesota-Wisconsin border. His blood alcohol concentration was .21. The two passengers in Messetler's car and the driver of the other car were seriously injured. Messetler's automobile was insured by appellant BLC Insurance Co. Wisconsin's drinking age at the time of the accident was 18, while Minnesota's was 19.

Dibbo's is owned and operated by respondent Westin, Inc., a Wisconsin corporation. At the time of the accident, Westin, on behalf of Dibbo's, was advertising on only one Twin City radio station, KQRS-FM. KQRS's target audience are persons between the ages of 18 and 30. Dibbo's Bar first advertised on KQRS in 1979, running twelve commercials between November 20 and November 24, 1979. From March 1980 through November 1982, Dibbo's began to advertise by 30 second commercials on an average of 10 to 15 times per week. The scripts informing listeners of daily drink specials were always approved by Dibbo's. The advertising cost approximately $11,000 in 1980 and $12,000 in 1981, Westin purchased in excess of $20,000 of goods and services, excluding advertisement costs, in Minnesota.

ISSUE

Did Westin, Inc. have the requisite minimum contacts with Minnesota to permit Minnesota to exercise personal jurisdiction over it?

ANALYSIS

Westin argues it does not have sufficient "minimum contacts" with Minnesota so as to permit a constitutional exercise of personal jurisdiction under Minnesota's long-arm statute. The long-arm statute provides for jurisdiction over a foreign corporation when that corporation commits an act outside of Minnesota that causes injury or property damage inside the state. Minn. Stat. § 543.19, subd. 1(d) (1982).

We realize BLC relied on section 543.19, subd. 1—"Commits any act in Minnesota"—when it commenced

the present action against Westin. Under the former language of clause (c) —"Commits any tort ... Minnesota"— BLC would have had jurisdiction. The supreme court in *Anderson v. Luitjens,* 311 Minn. 203, 247 N.W.2d 913 (1976), interpreted the former language so that an injury occurring in Minnesota constituted commission of a tort in the state. *Id.* at 206, 247 N.W.2d at 915. Because Messetler was injured in Minnesota, clause (c) would have been applicable. This rendered superfluous clause (d) which provided for jurisdiction when a tort was committed "outside of Minnesota causing injury or property damage within Minnesota." In response to the court's decision in *Luitjens,* the legislature amended the statute by, inter alia, substituting the word "act" to replace the word "tort" in clauses (c) and (d). 1978 Minn. Laws ch. 780, § 2. Because we believe clause (d)—"Commits any act outside Minnesota causing injury or property damage"—is clearly applicable to this case, we will treat BLC as having relied on the same. "All pleadings shall be so construed as to do substantial justice." Minn. R. Civ. P. 8.06.

"Minnesota interprets its long-arm statute * * * to extend personal jurisdiction in its courts to the limits of the due process clause of the Fourteenth Amendment." *Mid-West Medical, Inc. v. Kremmling Medical-Surgical Associates,* 352 N.W.2d 59, 60 (Minn. Ct. App. 1984). Due process requires sufficient minimum contacts between the nonresident defendant and the forum state so that requiring them to defend in the state does not violate "traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington,* 326 U.S. 310, 316 (1945). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself

of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The nonresident must be able to reasonably anticipate being haled into the forum state's court. *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Minnesota has adopted the following five factor test:

> An analysis of minimum contacts requires consideration of (1) the quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of those contacts to the cause of action, (4) the interest of the forum state, and (5) the convenience of the parties.

Dent-Air, Inc. v. Beech Mountain Air Service, Inc., 332 N.W.2d 904, 907 (Minn. 1983). The first three factors are the primary factors. *Rostad v. On-Deck, Inc.*, 354 N.W.2d 95, 98 (Minn. Ct. App. 1984).

Westin's 1981 purchase of goods and services in Minnesota was not in itself a sufficient contact with Minnesota. *Janssen v. Johnson*, 358 N.W.2d 117 (Minn. Ct. App. November 20, 1984); *see Dent-Air, Inc.*, 332 N.W.2d at 907. In *Janssen*, we held that Johnson, a Wisconsin bar owner, did not have sufficient contacts to permit Minnesota courts to exercise personal jurisdiction over him, where the only Minnesota contacts were purchasing bar supplies and equipment from a St. Paul supplier and hiring a Minnesota attorney. We noted, however, that Johnson did not "actively solicit" Minnesota patrons and that "a decisive fact is that Johnson never advertised in Minnesota newspapers after he purchased the bar." *Id.* at ——.

In the present case, Westin actively solicited Minnesota

customers. Westin advertised extensively in Minnesota from November 1979 to November 1982 through as many as 15 commercials per week, each commercial about 30 seconds in length, costing approximately $23,000 between 1980 and 1981. Such conduct is a purposeful and active solicitation of Minnesota customers.

Westin relies heavily on the supreme court's decision in *West American Insurance Co. v. Westin, Inc.*, 337 N.W. 2d 676 (Minn. 1983), which also involved the issue of personal jurisdiction over Westin in a 1978 drinking related accident. We find that case to be distinguishable because in *West American*, the sole contact between Westin and Minnesota was a hearsay allegation that Minnesota Highway Patrol officers would testify that of the young people who are involved in drinking related accidents on the Minnesota side of the Hudson Bridge, 75% had been drinking at Dibbo's. *Id.* at 678.

The accident in *West American* occurred on November 17, 1978, a year prior to Dibbo's advertising on KQRS. As Justice Wahl stated in *West American*: "Had solicitation-type contacts been alleged, * * * jurisdiction could have been constitutionally exercised." *Id.* at 681 (Wahl, J., concurring specially). The purposeful behavior of Westin in its advertising program in Minnesota is such that it should have reasonably anticipated being haled into court here. *World-Wide*, 444 U.S. at 297.

DECISION

Westin, Inc. has the requisite minimum contacts with Minnesota to permit Minnesota to exercise personal jurisdiction over it.

Reversed.

APPENDIX C

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

BLC Insurance Company, an Iowa corporation,
Plaintiff,

vs.

Westin, Inc., a Wisconsin corporation,
Defendant.

ORDER
File No. 804856

This matter was heard before the Honorable William S. Posten, Judge of Hennepin County District Court, at Special Term on March 7, 1984, upon motion of Defendant to dismiss for lack of personal jurisdiction over the Defendant, and on motion of Plaintiff for leave to amend its Complaint. MICHAEL A. PYSNO, ESQ., represented Plaintiff. THOMAS D. BELL, ESQ., represented Defendant.

Based upon the file, record and proceedings, including afffidavits and exhibits, memoranda and arguments of counsel,

IT IS HEREBY ORDERED:

1. Plaintiff's motion to amend its Complaint is denied

2. Defendant's motion to dismiss Plaintiff's Complaint is granted. The motion to dismiss is treated as a motion

for summary judgment, and judgment shall be entered accordingly.

DATED March 21st, 1984.

BY THE COURT:

/s/ William S. Posten
Judge of District Court

MEMORANDUM

This case involves a subrogation "dram shop" claim by Plaintiff against Defendant, a Wisconsin corporation which owns Dibbo's tavern. Plaintiff's insured, a Minnesota resident, drove to Wisconsin, drank alcoholic beverages at Dibbo's, and was involved in a car accident in Minnesota while driving home. Plaintiff originally based its claim of jurisdiction on Minn. Stat. 543.19, Subd. 1 (c) which states:

> "Subdivision 1. As to any cause of action of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any foreign corporation or any nonresident individual, or his personal representative, in the same manner as if it were a domestic corporation or he were a resident of this state. This section applies if, in person or through an agent, the foreign corporation or nonresident individual:
>
> (c) Commits any act in Minnesota causing injury or property damage.

> "Subdivision 3. Only causes of action arising from acts enumerated in subdivision 1 may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

Plaintiff sought to amend its Complaint to allege personal jurisdiction under Minn. Stat. §303.13 (foreign corporation commits a tort in whole or in part in Minnesota against a resident of Minnesota), and to allege that "on information and belief", Plaintiff's insured, Robert Messetler, and his passengers Keith Bode and Michael Churchill learned of Dibbo's Bar "as a result of its radio advertising and were induced to travel to Wisconsin to consume alcohol in response to that advertising". Defendant moved to dismiss for lack of personal jurisdiction. Defendant's motion is treated as a motion for summary judgment because Defendant has served and filed an Answer tc the Complaint and it relied upon matters outside the pleadings See Minnesota Rule of Civil Procedure 12.02, 12.03.

To establish jurisdiction over a nonresident defendant, it must be authorized by statute and be consistent with the due process guarantees of the Constitution. *All Lease Co. Inc. v. Betts,* 294 Minn. 473, 474, 199 N.W.2d 821 (1972). Plaintiff has the burden of proof. *All Lease Co., supra,* at 474.

Plaintiff has failed to show that this case falls within Minn. Stat. §543.19, Subd. 1(c). Plaintiff relies upon *Blamey v. Brown,* 270 N.W.2d 884 (Minn. 1978), cert. denied 444 U.S. 1070 (1980). *Blamey* involved facts similar to the present case, with the exception that no advertising was alleged in *Blamey*. The Minnesota Supreme Court construed 543.19, Subd. 1(c), which at that time

was worded "(c) Commits any *tort* in Minnesota causing injury or property damage" (emphasis added), to mean that a tort has occurred in Minnesota if property damage from the alleged tortious conduct resulted in Minnesota. *Blamey, supra,* at 887. Section 543.19, Subd. 1(c) was amended in 1978, changing the word "tort" to "act". Under the current statute, the car accident in Minnesota is not an act of Defendant, operator of Dibbon's tavern. Plaintiff asserted that a tort is equivalent to an act, citing *State ex rel. Nelson v. Nelson,* 298 Minn. 438, 216 N.W. 2d 140 (1974), where the court held where a Minnesota resident brings a paternity action against a nonresident for a child conceived in Minnesota, that the action would be denominated a tort within the scope of §543.19, Subd. 1(c). *Nelson* is simply not applicable to the present case, where the alleged wrongful act of serving drinks occurred in Wisconsin.

Defendant's advertising in Minnesota cannot be the basis for jurisdiction under §543.19, Subd. 1(c) because the cause of action did not arise out of the advertising, it arose out of the serving of drinks in Wisconsin. See: *Wisselman v. Mount Snow, Ltd.,* 524 F.Supp. 78, 79-80 (E.D.N.Y. 1981); *Cohen v. Vaughan Bassett,* 495 F.Supp. 849, 851 (S.D.N.Y. 1980); *Orthman v. Apple River Campground, Inc.,* U.S. Dist. Ct., Minn. Civil No. 4-83-335 (Oct. 12, 1983).

Plaintiff has also failed to show that due process was satisfied. Due process requires that the defendant be given adequate notice of the suit and be subject to the personal jurisdiction of the court. *World-Wide Volkswagon Corp. v. Woodson,* 444 U.S. 286 (1980). Lack of notice is not in issue. In order to be properly subject to the jurisdiction of

this court, the defendant must have sufficient minimum contacts with the State of Minnesota such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *World-Wide Volkswagon, supra,* at 292; *West American Ins. Co. v. Westin, Inc.,* 337 N.W. 676, 678 (Minn. 1983). The defendant's conduct and connection with the forum state must be such that he "should reasonably anticipate being haled into court there", mere foreseeability is not enough. *World-Wide Volkswagon, supra,* at 297; *West Am. Ins. Co. v. Westin, Inc., supra,* at 679.

Due process limitations on state court jurisdiction are grounded on two concerns: 1) integrity of state sovereignty and a respect for territoriality, 2) the importance of fairness toward the foreign defendant. *West Am. Ins. Co. v. Westin, Inc., supra,* at 678. The critical focus in any jurisdictional analysis must be on "the relationship among the defendant, the forum, and the litigation. *Rush v. Savchuk,* 444 U.S. 320, 327 (1980); *West Am. Co. v. Westin, Inc., supra,* at 678. The Minnesota Supreme Court has adopted the following factors to be considered when determining the sufficiency of the contacts:

1. The quantity of the contacts.
2. The nature and quality of the contacts.
3. The source and connection of those contacts to the cause of action.
4. The interest of the forum state.
5. The convenience of the parties.

Dent Air, Inc. v. Beech Mountain Air Service, 332 N.W. 2d 904, 907 (Minn. 1983). With the exception that Plain-

tiff in the present case alleges that Defendant advertised in Minnesota, the facts in the present case are virtually identical to those in *West Am. Ins. Co. v. Westin, Inc.;* the same defendant, Minnesota resident plaintiff, accident in Minnesota following drinking at defendant's tavern in Wisconsin, the tavern is 15 miles east of St. Paul, Minnesota. The Court in *West Am. Ins. Co* held that due process prohibited jurisdiction of the suit in Minnesota, essentially overruling its decision in *Blamey v. Brown, supra,* where it found proper jurisdiction upon similar facts.

The decision in *Blamey* was based on three factors: 1) the consequence of the sale (the accident in Minnesota) was forseeable by defendant, 2) Minnesota had a strong interest in providing a forum for an injured Minnesota resident, 3) the short distance vitiated the inconvenience to defendant. *West Am. Ins. Co. v. Westin, Inc., supra,* at 679. The Court stated that the United States Supreme Court in *World-Wide Volkswagon* rejected the type of forseeability consideration which was central to *Blamey,* and that the proper consideration was whether defendant's conduct in connection with the forum state are such that he should reasonably anticipate being haled into court there. *West Am. Ins. Co. v. Westin, Inc., supra,* at 679. The Court also held that Minnesota's interest in providing a forum for plaintiff does not support personal jurisdiction over a foreign defendant because the primary focus must be on the defendant's interests and the defendant's contacts with the state. *West Am. Ins. Co. v. Westin, Inc., supra,* at 679-80. Finally, the Court held that the convenience of the parties is irrelevant unless the defendant also has sufficient contacts with the forum state. *West Am. Ins. Co. v. Westin, Inc., supra,* at 680.

The foregoing analysis of *Blamey v. Brown* and *West Am. Ins. Co. v. Westin, Inc.* makes clear that in the present case, due process is not satisfied by the forseeability of the accident by Defendant, Minnesota's interest in providing a forum for the resident Plaintiff, or the convenience of trying the case in Minnesota. The remaining contact is $36,496.53 worth of goods and services, including $11,000 for radio advertising, purchased by Dibbo's in Minnesota in 1981, the year in which the accident occurred. The purchase of goods and services in Minnesota, excluding the advertising, will not alone support jurisdiction because this contact is not connected to the cause of action. Likewise, this Court believes that radio advertising in Minnesota is not a sufficient contact because even if it could be shown that Plaintiff's insured went to Dibbo's in response to the advertising, the accident arose out of the serving of alcoholic beverages in Wisconsin, not from the advertising. See *Orthman v. Apple River Campground, Inc.*, U.S. Dist. Ct. Civil No. 4-83-335 (Oct. 12, 1983) (where plaintiff injured in diving accident allegedly was solicited by Wisconsin defendant's radio ad, court found lack of due process for suit in Minnesota, "Defendant's promotional activities in this forum are not enough to confer jurisdiction in this court consistent with due process"). Plaintiff cited the concurring opinion of Justice Wahl in *West Am. Ins. Co.* and the dissenting opinion of Justice Scott in which he was joined by Justices Todd and Yetka, in support of its position that solicitation is a sufficient contact to satisfy due process. Although the concurring and dissenting opinions support Plaintiff's claim, the majority opinion did not reflect this holding, therefore this Court will not adopt the minority opinion absent direction

from the Court of Appeals or the Minnesota Supreme Court.

Since jurisdiction of the Minnesota courts over Defendant Westin, Inc. in this case violates due process, amendment of the Complaint to assert Minn. Stat. §303.13 as an alternative to Minn. Stat. §543.19, Subd. 1(c) as a statutory basis for jurisdiction, would serve no purpose.

WSP